

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

MAR 30 2007

COURT OF APPEALS
DIVISION TWO

G. PUCHI WHOLESALE FOODS)
CORPORATION, an Arizona)
corporation; ALFREDO PUCHI, JR., and)
MAGDA PUCHI, husband and wife,)
Third-Party Plaintiffs/Appellants,)
v.)
BARRY BOREN,)
Third-Party Defendant/Appellee.)
_____)

2 CA-CV 2006-0165

DEPARTMENT B

MEMORANDUM DECISION

Not for Publication

Rule 28, Rules of Civil

Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF SANTA CRUZ COUNTY

Cause No. CV-05-241

Honorable Denneen L. Peterson, Judge Pro Tempore

AFFIRMED

The Law Office of Robert F. Kuhn, P.L.L.C.
By Robert F. Kuhn

Tucson
Attorney for Third-Party
Plaintiffs/Appellants

Fennemore Craig, P.C.
By George O. Krauja and Zora K. Shaw

Attorneys for Third-Party
Defendant/Appellee

B R A M M E R, Judge.

¶1 Appellants G. Puchi Wholesale Grocery Corporation, Alfredo Puchi, and Magda Puchi (collectively, “Puchi”) purchased 450 cases of cigarettes from Inter “K”, N.V., a Belgian company. Litigation ensued, and Puchi appeals from the trial court’s grant of appellee Barry Boren’s motion for summary judgment regarding Puchi’s third-party complaint against Boren.¹ Puchi contends the trial court erred in dismissing contract claims against Boren and in finding Puchi did not reject the cigarettes in a reasonable time. Puchi also argues the court should not have dismissed his common law fraud and Consumer Fraud Act claims against Boren. Finally, Puchi asserts the court erred in granting attorney fees to Boren. We affirm.

Factual and Procedural Background

¶2 On appeal from a summary judgment, we view the evidence and all reasonable inferences therefrom in the light most favorable to the party against whom summary judgment was granted. *Walk v. Ring*, 202 Ariz. 310, ¶ 3, 44 P.3d 990, 992 (2002). In December 2003, Inter “K” purchased 450 cases of Philip Morris branded cigarettes made in the Philippines. The cigarettes were shipped to the United States and seized by United States Customs and Border Protection agents after they arrived in February. When Inter “K” learned the cigarettes had been seized, it hired Florida attorney Barry Boren, who had a “very good reputation in Customs law,” to obtain their release.

¹Boren filed a motion to dismiss the complaint, which the trial court treated as a motion for summary judgment because it “consider[ed] matters outside of the pleadings.” See *Pritchard v. State*, 163 Ariz. 427, 433, 788 P.2d 1178, 1184 (1990).

¶3 Theodorus Rooijakkers, the managing director of Inter “K”, looked for a buyer for the cigarettes. Alfredo Puchi, the president of a Nogales company that operated a duty-free shop, negotiated with Rooijakkers in December 2004. Puchi acknowledges the cigarettes were offered to him for export only. In his statement of facts submitted to the trial court, Puchi also agreed with Boren’s assertion that “all decisions for Inter [“K”] regarding the sales contract between Inter [“K”] and Puchi were made by Rooijakkers” and that he and Rooijakkers “negotiated all contract terms.”

¶4 Puchi sent two “purchase orders,” signed only by Puchi, to Rooijakkers on December 14 and 15, 2004. These orders generally established that the 450 cases would be shipped from Los Angeles to Puchi and that the value of the contract was roughly \$160,000. The December 14 purchase order contained a note on the bottom stating, “I will sign a note to be written by [Boren] and I will sign my personal guarantee along with my wife.” Puchi and Rooijakkers signed a December 15 agreement stating Puchi would send a check to Boren for \$5,000 on that day and the payment would serve as a “guarantee for the purchase in full of [the] above lot as a whole.” The agreement also stated that half of the total lot would be shipped initially, with “payment on arrival” of \$83,322, and that “within 3 weeks of export” Puchi was committed “to purchase the balance” for another \$83,598, minus the \$5,000 deposit. A December 16 letter from Puchi stated only that he agreed to the terms of sale in the December 15 agreement and that the advance payment would be sent to Boren’s trust account. Puchi sent Boren a check for \$5,000. Boren sent Puchi an initialed facsimile copy of the check to acknowledge its receipt.

¶5 After Puchi and Inter “K” reached their agreement, Boren arranged with Customs to release the cigarettes, with the understanding they would only be sold for export. Boren also arranged for UPS Supply Chain Solutions, Inc. (“UPS”) to transport the cigarettes from the Customs warehouse in Los Angeles to Nogales. Despite the agreement to send only half the cigarettes initially, all 450 cases arrived at Puchi’s Nogales warehouse in late January 2005. Boren then demanded full payment for the cigarettes. Boren also contacted UPS, stating it wrongfully released the goods to Puchi, and demanded full payment.

¶6 Puchi testified in his deposition he had only agreed to pay for half the shipment with promissory notes, he did not have the funds to purchase 450 cases of cigarettes in cash, and he had informed Inter “K” that it could pick up the cigarettes. Puchi wrote an April 11 letter to Boren to negotiate a payment plan, which Puchi testified was “an attempt to avoid a lawsuit.” In the same letter, he stated that, although he was attempting to sell some of the cigarettes, they were “selling slow[ly]” because they were from the Philippines and “taste[d] bad.” He also stated he later learned the cigarettes were at least a year old and had not been stored properly, and this was the reason they were not selling. Puchi testified that, despite having several conversations with Boren over the seizure, neither Boren nor Rooijakkers told him about the age of the cigarettes. Boren agreed he never discussed the age of the cigarettes with Puchi and stated he did not have any knowledge of their actual age. Rooijakkers testified he never discussed the age of the cigarettes with Boren but said Boren could have determined they were at least a year old had it been “relevant.” Rooijakkers testified

repeatedly that cigarettes can last “up to two years without any problem” but that “[e]verything can be [a possible problem], even if [the cigarettes are] one month old.”

¶7 In July 2005, Inter “K” sued Puchi and UPS, alleging as to Puchi breach of contract, conversion, and quantum meruit and breach of a bailment contract against UPS. Puchi then filed a sixteen-count counterclaim, as well as a third-party complaint against Boren, alleging failure to pay rent, “relinquishment of title,” breach of contract, breach of the covenant of good faith and fair dealing, three breaches of implied warranties, two counts of common law fraud, a violation of the Consumer Fraud Act, violations of federal and state racketeering laws, “violation of Arizona Trademark Law,” “violation of . . . Tobacco Escrow Fund Law,” “violation of Arizona Free Trade Act,” and respondeat superior.

¶8 After Boren filed a motion to dismiss the complaint, the trial court dismissed seven of Puchi’s contract claims on the grounds “Boren did not have a contract with . . . Puchi” and Puchi did not reject the goods within a reasonable time. The court dismissed two of Puchi’s tort counts because it found Boren was “not a party to the transaction” and “did not negotiate the terms and conditions of the sale” and, again, because Puchi had failed to reject the goods. The trial court also dismissed Puchi’s claim under Arizona’s Consumer Fraud Act because Puchi “made no . . . allegation or showing” that he “relied on [Boren’s] unlawful practice and [was] damaged thereby.” Finally, the other six counts, not at issue in this appeal, were dismissed for various reasons, two by the agreement of both parties and without prejudice. The court later denied Puchi’s Rule 59, Ariz. R. Civ. P, 16 A.R.S., Pt. 2, motion to set aside its ruling, awarded Boren \$22,955.50 in attorney fees, and certifying there

“was no just reason for delay” pursuant to Rule 54, Ariz. R. Civ. P., 16 A.R.S., Pt. 2, entered judgment against Puchi. This appeal followed.

Discussion

Contract Claims

¶9 Puchi contends the trial court erred in granting summary judgment to Boren on Puchi’s contract claims, arguing “Boren was in a separate contract with Puchi.” He also argues Boren was an agent of Inter “K” and “Arizona law provides for a liberal approach to treating an agent . . . as a party to a contract.” The trial court rejected both claims, stating “there is no evidence that Puchi had a contract with Boren.”

¶10 A trial court properly grants summary judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(c), 16 A.R.S., Pt. 2; *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). “On appeal from a summary judgment, we must determine *de novo* whether there are any genuine issues of material fact and whether the trial court erred in applying the law.” *Bothell v. Two Point Acres, Inc.*, 192 Ariz. 313, ¶ 8, 965 P.2d 47, 50 (App. 1998). A trial court should only grant a motion for summary judgment “if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense.” *Orme Sch.*, 166 Ariz. at 309, 802 P.2d at 1008.

¶11 Puchi’s argument that he had a separate contract with Boren is difficult to understand. He does not tell us what this contract was. “For an enforceable contract to exist,

there must be an offer, an acceptance, consideration, and sufficient specification of terms so that the obligations involved can be ascertained.” *Rogus v. Lords*, 166 Ariz. 600, 602, 804 P.2d 133, 135 (App. 1991). Puchi’s claim is deficient as to all of these elements, and he fails to state any of the terms of this alleged agreement, much less sufficiently specify them.² Puchi argues, however, that Boren’s signature on the communications between the parties represented “his own ability to have cigarettes delivered [and this] represents [his] separate agreement with Puchi.” Puchi also contends Boren “wrongfully caused the 450 cases of cigarettes to be shipped into the Puchi Warehouse.” But it is undisputed Boren did not own any cigarettes. And Puchi agreed that “all decisions for Inter [“K”] regarding the sales contract between Inter [“K”] and Puchi were made by Rooijakkers” and that Puchi and Rooijakkers “negotiated all contract terms.” At best, the evidence established Boren helped Inter “K” sell its cigarettes, not that he had any separate agreement with Puchi. The trial court did not err in finding there was no contract between Puchi and Boren as a matter of law.

¶12 Puchi next asserts Boren, as an agent of Inter “K”, is liable for breach of contract. The trial court did not explicitly address the agency issue in its ruling, stating only that Puchi was not a party to the contract. However, even if Boren was an agent of Inter “K”, he is still not liable for breach of a contract between Puchi and Inter “K”. “One who signs

²Even if we could construe Boren’s initialing a facsimile of a check to acknowledge receipt of the \$5,000 down payment as some sort of separate agreement between him and Puchi, this alleged agreement expresses no terms, consideration, or evidence of mutual assent.

an agreement as the agent of a fully disclosed principal is not a party to that agreement and thus incurs no personal liability for the principal's breach of that agreement." *Ferrarell v. Robinson*, 11 Ariz. App. 473, 475, 465 P.2d 610, 612 (1970); *see also Hyatt Regency Phoenix Hotel Co. v. Winston & Strawn*, 184 Ariz. 120, 124 n.1, 907 P.2d 506, 510 n.1 (App. 1995) (same). It is undisputed Puchi knew Boren was working for Inter "K"; Puchi testified repeatedly Boren acted like "a sales agent or . . . representative of Inter "K"." The trial court did not err in granting summary judgment to Boren on Puchi's contract claims. *See Orme Sch.*, 166 Ariz. at 309, 802 P.2d at 1008.³

¶13 Puchi also argues the trial court erroneously determined he had not rejected the cigarette shipment within a reasonable time. Because the court's grant of Boren's motion for summary judgment was correct regardless of whether Puchi timely rejected the cigarette shipment, we need not address this argument.

Common Law Fraud Claims

¶14 In addition to his contract claims, Puchi also alleged Boren had fraudulently induced him to enter the contract with Inter "K".⁴ To prove fraud, a party must prove the

³In his opening brief, Puchi relies entirely on one case, *Premium Cigars International, Ltd. v. Farmer-Butler-Leavitt Insurance Agency*, 208 Ariz. 557, ¶ 35, 96 P.3d 555, 566 (App 2004), in support of his position that Boren, as an agent, is liable for breach of contract. However, that case addressed attorney fees awarded pursuant to A.R.S. § 12-341.01(A) and whether the claim had arisen in contract or tort. 208 Ariz. 557, ¶ 33-35, 96 P.3d at 566. It is therefore inapposite.

⁴In his opening brief, Puchi does not explain what facts support his fraud claims, instead reciting a portion of his complaint and stating only that there are "genuine issues of material fact." Other than in the repetition of his complaint, he refers to Boren's alleged failure to disclose material facts only in his discussion of his Consumer Fraud Act claim.

other party knowingly made a false, material statement, intending for the defrauded party to rely on that statement “in the manner reasonably contemplated.” *Echols v. Beauty Built Homes, Inc.*, 132 Ariz. 498, 500, 647 P.2d 629, 631 (1982). Further, the defrauded party must have been unaware of the statement’s falsity and must have relied on it to his or her consequent and proximate injury. *Id.* All the elements of fraud must be shown by clear and convincing evidence sufficient to overcome the presumption of honesty. *Rhoads v. Harvey Publ’ns, Inc.*, 145 Ariz. 142, 146, 700 P.2d 840, 844 (App. 1984).

¶15 In his complaint, Puchi alleged Boren did not intend to prepare the promissory note Puchi had requested and “knowingly withheld . . . [his] intent to transfer the entire shipment [of cigarettes] to [Puchi’s warehouse].” Generally, a fraudulent misrepresentation must concern a present or pre-existing fact and not unfulfilled promises or statements about future events. *Ahmed v. Collins*, 23 Ariz. App. 54, 56-57, 530 P.2d 900, 902-03 (1975). Arizona law, however, permits a party to meet the material misrepresentation element by proving the other party made a promise with no intent to perform at the time the promise was made. *Employer’s Liability Assurance Corp. v. Lunt*, 82 Ariz. 320, 324, 313 P.2d 393, 396 (1957). Fraudulent intent may be inferred from circumstantial evidence, but that evidence

Indeed, Puchi fails to describe the elements of fraud or cite any legal authority in support of his position. *See* Ariz. R. Civ. App. P. 13(a)(6), 17B A.R.S. (appellant’s brief shall contain “the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on”). Because we are “inclined to decide cases on their merits and not to punish litigants because of the inaction of their counsel,” we address this issue on its merits. *Clemens v. Clark*, 101 Ariz. 413, 414, 420 P.2d 284, 285 (1966). We suggest, however, that Puchi’s counsel comply with our rules when practicing in this court.

must be independent of a party's failure to perform. *McAlister v. Citibank (Arizona)*, 171 Ariz. 207, 214, 829 P.2d 1253, 1260 (App. 1992).

¶16 Even if we assume Boren's promise to generate the promissory note for Puchi was evidenced by his failure to reject Puchi's request that he do so, Puchi points to nothing in the record suggesting Boren did so in order to induce Puchi to enter the contract with Inter "K". Nor has Puchi identified evidence that Boren intended to ship all, rather than half, the cigarettes to Puchi at the time Puchi and Inter "K" entered into the contract. Accordingly, Puchi's fraud claim based on those alleged misrepresentations necessarily fails. *See id.*

¶17 Puchi also alleged in his complaint that Boren "knowingly withheld the age of the shipment from [Puchi]" to induce Puchi to contract with Inter "K". In Arizona, a party may be liable for fraudulent nondisclosure under § 551 of the Restatement (Second) of Torts (1977). *See Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395*, 201 Ariz. 474, n.22, 38 P.3d 12, 34 n.22 (2002); *see also Schock v. Jacka*, 105 Ariz. 131, 133, 460 P.2d 185, 187 (1969) (concealment of facts "may constitute actionable fraud" when there is "a concealment of facts which the party is under a legal or equitable obligation to communicate"). Restatement § 551(1) states:

One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.

“[W]here a seller knows of facts materially affecting the value of the property and knows that the facts are not known to the buyer, the seller has a legal duty to disclose such facts.” *Lombardo v. Albu*, 199 Ariz. 97, ¶ 8, 14 P.3d 288, 290 (2000).

¶18 As we explained in our discussion of Puchi’s contract claims, Boren was not a party to any contract with Puchi. An agent, however, may be personally liable in tort, even for actions undertaken for the principal’s benefit. *See* Restatement (Second) of Agency § 343 (1958) (“An agent who does an act otherwise a tort is not relieved from liability by the fact that he acted at the command of the principal or on account of the principal.”); Restatement (Second) of Agency § 348 (“An agent who fraudulently makes representations, uses duress, or knowingly assists in the commission of tortious fraud or duress by his principal or by others is subject to liability in tort to the injured person although the fraud or duress occurs in a transaction on behalf of the principal.”); *cf. Borbon v. City of Tucson*, 27 Ariz. App. 550, 553, 556 P.2d 1153, 1156 (1976) (“[T]he agent is . . . liable to third persons under general negligence principles.”). If Boren was Inter “K”’s agent, then he had a duty to disclose facts unknown to Puchi affecting the value of the cigarettes, if Boren knew those facts would influence Puchi’s decision to purchase them. *See* Restatement (Second) of Torts § 551(1).

¶19 The trial court stated in its ruling on Puchi’s tort claims that Boren was “not a party to the transaction” and “did not negotiate the terms and conditions of the sale.” It is not clear from this statement whether the trial court determined Boren was not an agent of Inter “K” or only that Boren was not a principal to the transaction. There is sufficient

evidence in the record, however, to support the inference Boren acted as Inter “K”’s agent prior to execution of the sales contract with Puchi.

¶20 Boren and Rooijakkers both deny Boren participated in the negotiation of the transaction’s terms or acted as Inter “K”’s agent. Agency, however, does not necessarily depend on the existence of an agreement between the agent and principal. “An apparent or ostensible agent is one where the principal has intentionally or inadvertently induced third persons to believe that such a person was his agent although no actual or express authority was conferred on him as agent.” *Reed v. Gershweir*, 160 Ariz. 203, 205, 772 P.2d 26, 28 (App. 1989). “[I]n order to establish apparent authority the record must reflect that the . . . principal not only represented another as his agent, but that the person who relied on the manifestation was reasonably justified in doing so under the facts of the case.” *Id.* Puchi stated in his affidavit that Rooijakkers had told him Boren “would handle the cigarette transaction,” that he had had “at least a couple of communications with [Boren] by the time . . . the overall agreement was entered” about the seizure of the cigarettes, and that “Boren’s conduct at all times was . . . that of a sales agent.” Moreover, the December 15 agreement provided the advance payment be made to Boren as Inter “K”’s attorney and, in the December 14 purchase order, Puchi requested that Boren prepare a promissory note. These facts permit the inference Boren acted as Inter “K”’s apparent agent regarding the transaction and, therefore present a disputed issue of fact. *See Orme Sch.*, 166 Ariz. at 309, 802 P.2d at 1008. Even if Boren was Inter “K”’s agent, however, there is no evidence Boren knew or should have known the age of the cigarettes was material to the transaction.

¶21 Although Boren and Rooijackers deny Boren was aware of the cigarettes' age, Rooijackers admitted in his deposition Boren could have learned the minimum age of the cigarettes from the documents related to their seizure. There is no evidence, however, permitting a jury to conclude, by clear and convincing evidence, that Boren was aware the age of the cigarettes could have significantly affected their value and, thus, that he had a duty to disclose that fact to Puchi. *See Lombardo*, 199 Ariz. 97, ¶ 8, 14 P.3d at 290. Evidence suggesting Boren had expertise in the legal issues surrounding cigarette import and export would not, standing alone, permit a jury to infer he would have known the shelf life or proper storage procedures for cigarettes. Nor does anything in the record suggest Puchi had told Boren that he was interested in purchasing only "fresh" cigarettes or that their age was in any way material to him. Without evidence of such knowledge, Puchi cannot prove Boren knew the age of the cigarettes was material to Puchi's decision to purchase them. *See Orme Sch.*, 166 Ariz. at 309, 802 P.2d at 1008. Accordingly, the trial court did not err in granting Boren's motion for summary judgment on Puchi's fraudulent nondisclosure claim.⁵ *See Guo*

⁵Puchi asserted at oral argument in this court that, in response to Boren's motion for summary judgment, Puchi had alleged Boren knew the cigarettes' age was material to the transaction. Puchi argued that allegation was sufficient to overcome summary judgment on the question of Boren's duty because Boren had not specifically denied it. Puchi stated in his third-party complaint that "Boren . . . knew or had substantial reason to believe that [Puchi] would not have purchased any portion of the shipment if [Puchi] had known the truth of the age of the cigarettes and the circumstances of their status in the United States." Puchi was unable, however, to identify any evidence in the record to support that allegation. Boren argued in his motion for summary judgment that there was no evidence he owed a duty to disclose the cigarettes' age to Boren and specifically denied he had "even consider[ed]" the age of the cigarettes when talking to Puchi. That statement, in the absence of controverting evidence, supports the inference that Boren was unaware the cigarettes' age was material to the transaction. "Upon a moving party's prima facie showing that no genuine issue of

v. Maricopa County Med. Ctr., 196 Ariz. 11, ¶ 16, 992 P.2d 11, 15 (App. 1999) (“We may affirm a summary judgment even if the trial court reached the right result for the wrong reason.”).

Consumer Fraud Act Claim

¶22 Puchi also alleged Boren’s failure to disclose the age of the cigarettes violated Arizona’s Consumer Fraud Act, A.R.S. §§ 44-1521 through 44-1534. “A private right of action exists for damages caused by a violation of A.R.S. § 44-1522(A).” *Haisch v. Allstate Ins. Co.*, 197 Ariz. 606, ¶ 12, 5 P.3d 940, 944 (App. 2000). Section 44-1522(A) provides that “any . . . omission of any material fact with intent that others rely upon such . . . omission, in connection with the sale or advertisement of any merchandise” is unlawful. Assuming, without deciding, that the Act applies to a transaction between merchants, Puchi’s claim fails because he failed to provide any evidence Boren intended that Puchi rely on the omission of facts concerning the cigarettes’ age. And, as we explained in our discussion of Puchi’s fraudulent nondisclosure claim, there is no evidence Boren knew or should have known the cigarettes’ age was material to the transaction or to Puchi. Thus, the trial court did not err by granting Boren’s motion for summary judgment on Puchi’s Consumer Fraud Act claim.

Attorney Fee Award

¶23 Puchi appeals from the trial court’s attorney fee award of \$22,955.50 to Boren pursuant to A.R.S. § 12-341.01(A), which permits a trial court to award reasonable attorney

material fact exists, the opposing party bears the burden of producing sufficient evidence that an issue of fact does exist.” *Doe v. Roe*, 191 Ariz. 313, ¶ 33, 955 P.2d 951, 961 (1998). Puchi has failed to meet this burden.

fees to “the successful party” in a “contested action arising out of a contract.” We review a trial court’s award of attorney fees for an abuse of discretion. *See Kuehn v. Stanley*, 208 Ariz. 124, ¶ 34, 91 P.3d 346, 354 (App. 2004).

¶24 In his motion to dismiss the complaint, Boren asserted, inter alia, that the Santa Cruz County Superior Court “lack[ed] personal jurisdiction over [him].” In its order granting Boren’s motion, the trial court determined “Boren had sufficient contacts with Arizona with respect to the subject transaction in order for specific personal jurisdiction to exist.” Thus, Puchi reasons he was the successful party concerning the jurisdiction question and should not be required to pay Boren’s attorney fees related to it, relying primarily on *Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. 183, 675 P.2d 927 (App. 1983).

¶25 *Schweiger* does not support Puchi’s argument. There, Division One of this court stated, “time spent on unsuccessful issues or claims may not be compensable.” *Id.* at 188, 673 P.2d at 932. It further stated, however, that “where a party has accomplished the result sought in the litigation, fees should be awarded for time spent even on unsuccessful legal theories.” *Id.* at 189, 673 P.2d at 933. The court explained only those fees for unsuccessful claims that “could have been litigated separately” and unsuccessful claims “[w]here a party has achieved only partial or limited success” should be excluded from an attorney fee award. *Id.* We do not see how Boren could have litigated his personal jurisdiction defense separately, and although that particular defense was unsuccessful, he clearly “accomplished the result [he] sought,” *id.*, when the trial court dismissed all the claims asserted against him in Puchi’s third-party complaint. Accordingly, the trial court did

not abuse its discretion by including fees related to Boren's personal jurisdiction defense in the attorney fee award.

¶26 The attorney fee award also included fees for work performed by Boren's Florida attorney, Gerson Joseph, in addition to fees for work performed by Boren's Arizona attorney, George Krauja. Puchi contends that portion of the award was improper because Joseph did not file a separate fee request, Boren did not notify Puchi that he would request fees for Joseph's work, Joseph performed the majority of his work on the case before the trial court granted his motion to appear pro hac vice, and Joseph "did not provide the Court his legal educational background, his legal background, or whether Mr. Joseph had expertise that required his involvement." Krauja's affidavit in support of Boren's fee application, however, included a detailed accounting of Joseph's participation in the case. Additionally, Krauja stated in his affidavit that he had "reviewed the time expended" by Joseph and "believe[d] the[] amounts sought [were] reasonable and appropriate, and properly charged to this matter." Nothing more was required. Puchi cites no authority, and we find none, requiring each billing attorney to provide a separate affidavit. Nor must a party notify an opposing party that his or her attorney may collaborate with other attorneys during litigation. And there is no requirement that an out-of-state attorney be admitted pro hac vice for work performed by that attorney to be included in an attorney fee award or provide information about his or her legal education or expertise. *Cf. Continental Townhouses East Unit One Ass'n v. Brockbank*, 152 Ariz. 537, 544, 733 P.2d 1120, 1127 (App. 1986) (hours expended by law clerks, legal assistants, and paralegals may be included in attorney fee award); Ariz.

R. Sup. Ct. 38(a), 17A A.R.S. (no requirement that attorney submit educational background or information about legal expertise in pro hac vice application). Moreover, even if Krauja and his firm were fully capable of litigating the case without Joseph's aid, nothing prohibited them from obtaining it. Thus, the trial court did not abuse its discretion by relying solely on Krauja's affidavit in determining a reasonable award.

¶27 Lastly, Puchi contends Joseph and Krauja engaged in "fee splitting" that did not comply with Ethical Rule 1.5(e), Ariz. R. Prof'l Conduct, Ariz. R. Sup. Ct. 42, 17A A.R.S. Rule 1.5(e) permits attorneys "who are not in the same firm" to divide fees only if each attorney "assumes joint responsibility for the representation," the client gives written consent, and "the total fee is reasonable." Nothing in the record suggests there was any division of fees between Joseph and Krauja. The hours for work performed by Joseph and by Krauja and his firm were listed separately in the request for fees. Moreover, the rule governing fee splitting normally applies to contingency fee cases, not hourly fee cases. *See* E.R. 1.5 cmt. 8 ("A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist."). Therefore, even assuming a violation of ER 1.5(c) is a proper basis to contest an attorney fee award, that rule does not apply here.

Disposition

¶28 We affirm the trial court's grant of Boren's motion for summary judgment and its award of attorney fees to Boren. We grant Boren's request for reasonable attorney fees

on appeal pursuant to § 12-341.01(A) upon compliance with Rule 21(c), Ariz. R. Civ. App. P., 17B A.R.S.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

PHILIP G. ESPINOSA, Judge